100

(2)

No. 07-1542

FILED
JUL 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KYLE J. KELLY, PETITIONER

v.

BASS PRO OUTDOOR WORLD, LLC,
D/B/A BASS PRO SHOPS OUTDOOR WORLD

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DIVISION

RESPONDENT'S BRIEF IN OPPOSITION

PETER SUSSER
Counsel of Record

Littler Mendelson, P.C.
1150 17th Street, NW
Suite 900
Washington, D.C. 20036
(202) 414-6868

CHARLES E. REIS, IV

Littler Mendelson, P.C.
Two CityPlace Dr
Suite 200
St. Louis, MO 63141
(314) 432-4797

Attorneys for Respondent

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

I. Should a state appellate court which has determined that the amount of punitive damages awarded is excessive under the Due Process Clause of the 14th Amendment to the United States Constitution determine the extent and or amount to which punitive damages are permissible?

II. Should this Court grant review of a state court's determination that the amount of punitive damages awarded was excessive when Petitioner has not demonstrated any conflict between the state court's decision and established precedent?

III. Should this Court grant review of a state court's decision that $2,800,000.00 in punitive damages was unconstitutionally excessive when the actual damages were found to be $4,300.00?

IV. Should this Court grant review of the state court's decision even though Petitioner has not established any reason for overturning this Court's precedent regarding 14th Amendment limitations of punitive damages?

RULE 29.6

The parent company of Bass Pro Outdoor World, LLC, d/b/a Bass Pro Shops Outdoor World is Bass Pro, Inc. Bass Pro, Inc. is owned by Bass Pro World, LLC. There is no publicly held company that owns 10% or more of the stock of Bass Pro Outdoor World, LLC, d/b/a Bass Pro Shops Outdoor World.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

RELEVANT PROVISIONS INVOLVED 1

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

I. Respondent Agrees That the Missouri Appellate Courts Should Determine the Amount of Punitive Damages That Comports with the Due Process Claus 10

II. Petitioner Has Mischaracterized the Decisions of the Missouri Courts and Has Not Established the Existence of a Conflict With Established Precedent 13

III. Certiorari Should Not Be Granted on Whether a Jury Verdict in $2,800,000.00 of Punitive Damages with $4,300.00 in Actual Damages Comports with The Due Process Clause Because the Missouri Courts' Opinion that the Punitive Damages Were Unconstitutionally Excessive Comports With Established Precedent 16

IV. Certiorari Should Not Be Granted with Regard to Whether This Court Should Revisit Whether The Due Process Clause of the Fourteenth Amendment to the United States Constitution Sets Substantive Rights of Limited Punitive Damages Because Petitioner Has Not Demonstrated Any Reason For This Court to Reconsider Its Established Precedent Regarding Limitations on Punitive Damages 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) ..... *passim*
BMW of North America, Inc. v. Gore, 701 So.2d 507 (Ala. 1997) 13
Campbell v. State Farm Mutual Automobile Ins. Co., 98 P.3d 409 (Utah 2004) 19
Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 11, 26
Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634 (10th Cir. 1996) 12, 13, 21
Exxon Shipping Co. v. Baker, No. 07-219, 2008 WL 2511219 *1 (U.S. June 25, 2008) ..... *passim*
Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994) 17, 28, 29
Kelly v. Bass Pro Outdoor World, LLC, 245 S.W.3d 841 (Mo. Ct. App. 2007) ..... *passim*
Leatherman Tool Group, Inc. v. Cooper Industries, Inc., 285 F.3d 1146 (9th Cir. 2002) 11
Letz v. Turbomeca Engine Corp., 975 S.W.2d 155 (Mo. Ct. App. 1997) 17, 18
Phillip Morris USA v. Williams, 127 S.Ct. 1057 (2007) 28
Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140 (Mo. 2005) (en banc) 14, 15
State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

OPINIONS BELOW

The Supreme Court of Missouri's denial of the application for transfer is included on page A-99 of Petitioner's Petition for Writ of Certiorari. The opinion of the Eastern District of the Missouri Court of Appeals (Pet. Cert. A-19-A-41) is reported at 245 S.W.3d 841. The trial order from the district court is published at 2006 wl 4555229.

RELEVANT PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTERSTATEMENT OF THE CASE

Petitioner brought suit against his former employer, Respondent, alleging that he was terminated in violation of public policy for reporting an alleged crime. *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841, 846 (Mo. Ct. App. 2007) (Pet. For Cert. A-30). A jury found in Petitioner's favor, and awarded him $4,300.00 of compensatory damages and $2,800,000.00 in punitive damages. *Kelly*, 245 S.W.3d at 851 (Pet. For Cert. A-39).

Upon appeal by Respondent, the Missouri Court of Appeals found that the punitive damages award was unconstitutionally excessive. *Kelly*, 245 S.W.3d at 850 (Pet. For Cert. A-40). The Missouri Court of Appeals remanded the case, indicating that "Once there has been a jury finding as to the proper amount of punitive damages, the trial court can determine whether the amount of the award is in accordance with *Campbell*, *supra*, and enter judgment accordingly." *Kelly*, 245 S.W.3d at 851 fn. 5 (Pet. For Cert. A-40-A-41). The Missouri Supreme Court did not accept transfer of the case. (Pet. For Cert. A-99).

Petitioner has petitioned to this Court, challenging the Missouri courts' determination that the punitive damages award was unconstitutionally excessive and seeking to have the issue remanded to the Missouri appellate courts for a determination of the proper amount of punitive damages.

Petitioner worked as a Loss Prevention Agent for Respondent, a sporting goods and outdoor equipment store in St. Charles, Missouri. *Kelly*, 245 S.W.3d at 842 (Pet. For Cert. A-21).

Deborah Bost owned a Buick Park Avenue, which she purchased in the fall of 2002. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-22). Approximately two to four weeks prior to April 11, 2003, Ms. Boss encountered transmission problems while driving near Respondent's St. Charles location. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-22). Ms. Bost parked the Buick in the parking lot in front of Respondent's store. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-22).

Greater Missouri Builders owns the parking lot adjacent to Respondent's store location. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-21). While it does not own the parking lot, Respondent is permitted to section off portions of it for special events or for displays. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-21). Additionally, Respondent monitors the parking lot via security cameras. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-21).

As left by Ms. Bost, the Buick was not movable. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-22). The license plates on the Buick were registered to another vehicle owned by Ms. Bost. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-22). Ms. Bost did not contact anyone at Respondent's location regarding the Buick. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-22).

Contrary to Petitioner's assertions that there was nothing to indicate that the Buick had been abandoned, the Buick appeared to be abandoned since it had pollen covering the windshield. *Kelly*, 245 S.W.3d at 844 (Pet. For Cert. A-23-A24).

Karl Ritter was Respondent's Loss Prevention Manager at the St. Charles location. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-21). Two store associates reported to Mr. Ritter that the Buick had been abandoned. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-22). Mr. Ritter examined the Buick and determined that it was abandoned based upon pollen covering the windshield. *Kelly*, 245 S.W.3d at 844 (Pet. For Cert. A-23-A24).

Accordingly, Mr. Ritter asked Loss Prevention employees to contact the St. Charles, Missouri police

department to have the Buick towed. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-22). The St. Charles police department informed Loss Prevention employees that it could not tow the vehicle because it was on public property. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-22). When Mr. Ritter contacted the St. Charles police department himself, he was told that the police department could not tow the Buick unless it was inoperable or lacked current registration. *Kelly*, 245 S.W.3d at 843-844 (Pet. For Cert. A-22-A-23).

Additionally, the St. Charles police department told Mr. Ritter that it could not help him determine ownership of the vehicle because it was against policy. *Kelly*, 245 S.W.3d at 844 (Pet. For Cert. A-23). Given that Mr. Ritter contacted the St. Charles police department to attempt to learn the owner of the vehicle, Petitioner's assertion that Mr. Ritter "made no effort to learn" the name of the owner is not correct. (Pet. For Cert. pg. 3).

On April 11, 2003, Mr. Ritter told Michael McKernon, a Loss Prevention Agent, that he was going to find out who owned the Buick. *Kelly*, 245 S.W.3d at 843 (Pet. For Cert. A-21). Mr. McKernon positioned Respondent's security camera to face where the Buick was parked. *Kelly*, 245 S.W.3d at 844 (Pet. For Cert. A-23). Mr. Ritter used his personal "slim jim" to gain access to the Buick. *Kelly*, 245 S.W.3d at 844 (Pet. For Cert. A-23-A24).

After Mr. McKernon and Bobby Southerly, a Loss Prevention Team Leader, viewed the videotape of Mr. Ritter gaining access to the Buick, they showed the videotape to Petitioner. *Kelly*, 245 S.W.3d at 844 (Pet. For Cert. A-24-A-25). Petitioner called the St. Charles

police department and relayed a hypothetical situation to determine the legality of Mr. Ritter's entering the vehicle; the hypothetical did not include the name of Respondent or Mr. Ritter. *Kelly*, 245 S.W.3d at 844 (Pet. For Cert. A-25).

The Missouri Court of Appeals found that the videotape was shown and discussed through the Loss Prevention Department. *Kelly*, 245 S.W.3d at 845 (Pet. For Cert. A-25).

Petitioner met with Lee Beasley, Assistant Manager, on April 12, 2003, regarding the incident. *Kelly*, 245 S.W.3d at 845 (Pet. For Cert. A-26). Petitioner asserts that he told Mr. Beasley that the Loss Prevention Department knew about the incident. *Kelly*, 245 S.W.3d at 845 (Pet. For Cert. A-26).

Mr. Beasley told Petitioner that he wanted to speak with Jerry Rogers, General Manager, and Ron Goetz, Human Resources Manager, regarding how to proceed. *Kelly*, 245 S.W.3d at 845 (Pet. For Cert. A-26). Petitioner asserts that Mr. Beasley told him not to discuss the incident outside of the Loss Prevention Department. *Kelly*, 245 S.W.3d at 845 (Pet. For Cert. A-26). However, Mr. Beasley testified that he told Petitioner not to discuss the incident with anyone except Mr. Beasley and Mr. Rogers. *Kelly*, 245 S.W.3d at 845 (Pet. For Cert. A-26). Mr. Beasley also testified that he was unaware that every Loss Prevention Agent and Officer had viewed the videotape. *Kelly*, 245 S.W.3d at 845 (Pet. For Cert. A-26).

On April 14, 2003, Mr. Beasley met with Mr. Rogers and indicated that the incident would stay

between Mr. Beasley, Mr. Rogers, and Petitioner. *Kelly*, 245 S.W.3d at 845 (Pet. For Cert. A-27).

Mr. Rogers spoke with Mr. Ritter when he returned to work April 15, 2003. *Kelly*, 245 S.W.3d at 845 (Pet. For Cert. A-27). Mr. Ritter told Mr. Rogers that he had acted to attempt to determine ownership of the vehicle. *Kelly*, 245 S.W.3d at 845 (Pet. For Cert. A-27). Mr. Rogers considered Mr. Ritter's explanation reasonable and considered the incident a "non-issue." *Kelly*, 245 S.W.3d at 845 (Pet. For Cert. A-27).

The Missouri Court of Appeals found that Mr. Rogers told Mr. McKernon that when he learned who had telephoned the St. Charles police department, "their employment with Bass Pro was going to be cut short." *Kelly*, 245 S.W.3d at 846 (Pet. For Cert. A-28).

Mr. Ritter told Mr. Rogers that he had learned that Petitioner discussed his meeting with Mr. Beasley with other Loss Prevention Agents. *Kelly*, 245 S.W.3d at 846 (Pet. For Cert. A-28). Mr. Ritter did not make any recommendation with regard to what action should be taken with regard to Petitioner. *Kelly*, 245 S.W.3d at 846 (Pet. For Cert. A-28).

Mr. Rogers then contacted Mr. Goetz to discuss Petitioner's actions. *Kelly*, 245 S.W.3d at 846 (Pet. For Cert. A-28). Mr. Rogers and Mr. Goetz determined that Petitioner had been insubordinate by not following Mr. Beasley's direction not to discuss the incident with anyone and that Petitioner should be terminated. *Kelly*, 245 S.W.3d at 846 (Pet. For Cert. A-28). Mr. Rogers contacted John Sargent, Regional Human Resources Manager, who concurred that Petitioner should be terminated for insubordination for not

following Mr. Beasley's direction not to discuss the incident with anyone. *Kelly*, 245 S.W.3d at 846 (Pet. For Cert. A-28). Accordingly, Mr. Rogers and Mr. Goetz terminated Petitioner on April 17, 2003. *Kelly*, 245 S.W.3d at 846 (Pet. For Cert. A-28-A29).

After Petitioner's termination, Mr. Rogers met with the Loss Prevention Department. *Kelly*, 245 S.W.3d at 846 (Pet. For Cert. A-29). Mr. Rogers indicated that Petitioner was not terminated for reporting the incident, but for revealing the content of his discussions with Mr. Beasley to other Loss Prevention Department members after being explicitly told not to do so. *Kelly*, 245 S.W.3d at 846 (Pet. For Cert. A-29). Mr. Rogers also indicated that he gave Mr. Ritter permission to break into the Buick. *Kelly*, 245 S.W.3d at 846 (Pet. For Cert. A-29).

Contrary to Petitioner's assertions, Respondent did not threaten other employees with loss of their jobs if they failed to "cover up" the alleged crime. (Pet. For Cert. pg. 9). Rather, Mr. Rogers told Loss Prevention employees that they could be terminated if they did not stop discussing the issue amongst themselves. *Kelly*, 245 S.W.3d at 846 (Pet. For Cert. A-29).

A jury found that Respondent terminated Petitioner in violation of Missouri public policy. Petitioner was awarded $4,300.00 in compensatory damages and $2,800,000.00 in punitive damages. *Kelly*, 245 S.W.3d at 847 (Pet. For Cert. A-30).

Respondent appealed to the Missouri Court of Appeals regarding (1) whether Petitioner had made a submissible claim for wrongful termination, (2) whether Petitioner's punitive damages claim was properly

submitted to the jury, and (3) whether the jury award of $2,800,000.00 of punitive damages violated due process. *Kelly*, 245 S.W.3d at 847-850 (Pet. For Cert. A-30-A-35). The Missouri Court of Appeals affirmed the trial court rulings with respect to issues (1) and (2).

While the Missouri Court of Appeals found that there was evidence to support that Petitioner was fired for reporting what he reasonably believed to constitute a crime, there was no finding by the court that "Defendant had numerous witnesses give false testimony to conceal the real reason for Plaintiff's termination" as alleged by Petitioner on page 9 of his Petition for Certiorari.

The Missouri Court of Appeals found that the punitive damages award was unconstitutionally excessive. *Kelly*, 245 S.W.3d at 851 (Pet. For Cert. A-40). The court indicated that after there had been a jury retrial regarding the proper amount of punitive damages, the trial court could determine whether the amount awarded in the retrial comported with due process. *Kelly*, 245 S.W.3d at 851 fn. 5 (Pet. For Cert. A-40-A-41). The Missouri Supreme Court denied transfer of the case. (Pet. For Cert. A-99).

SUMMARY OF THE ARGUMENT

Petitioner seeks review on four grounds, three of which relate to the Missouri Court of Appeals' determination that the $2,800,000.00 of punitive damages awarded was unconstitutionally excessive in light of the $4,300.00 of compensatory damages awarded. Respondent believes that the Missouri Court of Appeals was correct in determining that the 651 to 1

ratio of punitive damages to compensatory damages was unconstitutionally excessive.

Moreover, the Missouri Court of Appeals did not simply look at the ratio of punitive to compensatory damages as alleged by Petitioner. It examined the specific facts of this case, as required by this Court's prior rulings. The Missouri Court of Appeals noted that Petitioner's relative brief period of unemployment did not justify the punitive damages awarded.

Further, the Missouri Court of Appeals' ruling was consistent with this Court's precedent, including *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003) and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Accordingly, Respondent urges that certiorari not be granted on Petitioner's Questions Presented II-IV.

With regard to Petitioner's Question Presented I, Respondent concurs that the Missouri appellate courts should be compelled to provide additional guidance regarding the maximum amount of punitive damages which comports with due process, rather than remanding this case for jury retrial on the issue of the amount of punitive damages. Requiring a retrial for a jury to again consider punitive damages without any guidance potentially puts Petitioner and Respondent in the same position a year from now, with a punitive damage award that is unconstitutionally excessive, and would require the parties to expend unnecessary costs and fees.

ARGUMENT

I. RESPONDENT AGREES THAT THE MISSOURI APPELLATE COURTS SHOULD DETERMINE THE AMOUNT OF PUNITIVE DAMAGES THAT COMPORTS WITH THE DUE PROCESS CLAUSE.

With regard to Petitioner's first Question Presented, Respondent agrees that the Missouri appellate courts should determine the amount of punitive damages in this case which comports with the Due Process Clause of the Fourteenth Amendment.

After finding that the punitive damages award in this case was "unconstitutionally excessive," the Missouri Court of Appeals remanded the case for retrial on the proper amount of punitive damages. *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841, 851 (Mo. Ct. App. 2007) (Pet. For Cert. A-40). The court indicated in a footnote that after there had been a new jury finding as to the amount of punitive damages, the trial court on remand could decide whether that amount was in accordance with *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). *Kelly*, 245 S.W.3d at 851 (Pet. For Cert. A-40). However, the Missouri Court of Appeals provided no guidance as to the proper amount of punitive damages. *Kelly*, 245 S.W.3d at 851 (Pet. For Cert. A-40).

The Missouri Supreme Court declined to accept transfer of this case from the Missouri Court of Appeals. (Pet. For Cert. A-99). As a result, the parties and the trial court were left with no guidance from the Missouri appellate courts regarding the maximum allowable amount of punitive damages on retrial.

Additionally, the parties and trial court were left with the very real possibility that the parties may be in the same position that they are in now after the retrial on the issue of punitive damages.

Respondent states that such a retrial would be judicially inefficient and would require the parties to incur unnecessary expense, potentially without resolving the issue that is now before the court. Respondent urges that the Missouri appellate courts must provide some guidance as to the maximum amount of allowable punitive damages.

In *BMW of North America, Inc. v. Gore*, this Court indicated that the state court should determine whether a new trial or an independent determination of the amount of punitive damages was proper. 517 U.S. 559, 586 (1996).

In other cases where a punitive damages award was held to be unconstitutionally excessive, appellate courts have provided guidance in the form of determining a maximum amount of punitive damages that is consistent with due process. In both *Campbell and Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001), this Court held that the punitive damages awards exceeded amounts allowable by the Due Process Clause of the Fourteenth Amendment. As noted by Petitioner, the allowable amount of punitive damages in both cases was determined by the appellate court on remand, not by new jury trial. *Campbell v. State Farm Mutual Automobile Ins. Co.*, 98 P.3d 409, 410 (Utah 2004) and *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 285 F.3d 1146, 1151 (9th Cir. 2002).

In *Campbell*, the Utah Supreme Court reduced the punitive damages to an amount it felt comported with this Court's precedent regarding punitive damages. "The Supreme Court directed us to recalculate the punitive damages award under principles articulated in its decision. We have performed this task and reduced the jury's award to $9,018,780.75 in punitive damages, a figure nine times the amount of compensatory and special damages awarded to the Campbells." *Campbell*, 98 P.3d at 410-411.

Likewise, in *Cooper*, the Ninth Circuit determined the amount of punitive damages it considered to be consistent with due process. 285 F.3d at 1152.

This Court recently examined a punitive damages award in *Exxon Shipping Co. v. Baker*, No. 07-219, 2008 WL 2511219, at *1 (U.S. June 25, 2008). In *Exxon Shipping Company*, this Court recently indicated that a one to one ratio between punitive damages and compensatory damages was appropriate. 2008 WL 2511219 at *21-22. Respondent believes that a one to one ratio between punitive and compensatory damages would also be proper in this case.

The determination of punitive damages is not a fact tried by a jury. *Cooper Industries, Inc.*, 532 U.S. at 437. To the contrary, the decision of whether the punitive damages awarded by a jury are so excessive that they violate the Due Process Clause of the United States Constitution is a "federal constitutional issue." *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 642 (10th Cir. 1996). Accordingly, an appellate court has authority to decide the amount of a

punitive damages award so that it comports with the Due Process Clause. *Continental Trend Resources, Inc.*, 101 F.3d at 642.

In *Continental Trend Resources, Inc.*, the Tenth Circuit determined "the maximum constitutionally permissible punitive award." 101 F.3d at 643. The court found that a ratio of approximately six to one between punitive and compensatory damages was correct. 101 F.3d at 644. *See also BMW of North America, Inc. v. Gore*, 701 So.2d 507, 515 (Ala. 1997) (reducing the punitive damages award from $2,000,000.00 to $50,000.00).

Respondent agrees with Petitioner that the Missouri appellate courts should provide an amount of punitive damages that would comport with the Due Process Clause.

II. PETITIONER HAS MISCHARACTERIZED THE DECISIONS OF THE MISSOURI COURTS AND HAS NOT ESTABLISHED THE EXISTENCE OF A CONFLICT WITH ESTABLISHED PRECEDENT.

For his second basis for certiorari, Petitioner contends that the Missouri Court of Appeals reversed the punitive damages verdict "solely on the ratio of actual to punitive damages." That contention is patently incorrect. The Missouri Court of Appeals used the holdings of this Court to determine that the jury award violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

With regard to whether the amount of punitive damages violated the Constitution, the Missouri Court of Appeals' opinion correctly identified the following factors for consideration: '(1) the reprehensibility of the defendant's conduct; (2) the disparity between the harm and punitive damages award; and (3) the difference between the punitive award and penalties authorized or imposed in comparable cases.' *Kelly*, 245 S.W.3d at 850 (Pet. For Cert. A-38), *citing Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 145 (Mo. 2005) (en banc) and *Campbell*, 538 U.S. at 418.

While the Missouri Court of Appeals indicated that it was focusing on the second factor, its decision that the amount of the award of punitive damages was unconstitutionally excessive was not based merely upon the ratio of compensatory damages to punitive damages. Rather, the court examined the "harm Kelly suffered by being terminated and unemployed for a relatively brief time" and compared that harm to the amount of punitive damages awarded. *Kelly*, 245 S.W.3d at 851 (Pet. For Cert. A-39-A-40).

Accordingly, the Missouri Court of Appeals' decision that the punitive damages awarded was unconstitutionally excessive was based upon the specific facts of the case, not a bright line test based upon the ratio of compensatory damages to punitive damages. The court noted that Petitioner's brief period of unemployment, combined with his termination, did not justify the $2,800,000.00 of punitive damages awarded. *Kelly*, 245 S.W.3d at 851 (Pet. For Cert. A-39-A-40). The court's analysis was consistent with this Court's direction that the "precise award in any case, of course, must be based upon the facts and circumstances

of the defendant's conduct and the harm to the plaintiff." *Campbell*, 538 U.S. at 425.

As a result, Petitioner's representation that the Missouri Court of Appeals simply compared the ratio of compensatory damages to punitive damages and automatically found the amount of punitive damages unconstitutional based upon that ratio is not correct. The Missouri Court of Appeals specifically noted that courts do not have license to 'toss aside considered jury verdicts based upon arbitrary ratios or mathematical formulae.' *Kelly*, 245 S.W.3d at 851 (Pet. For Cert. A-39), *citing Scott*, 176 S.W.3d at 144. Additionally, the Missouri Court of Appeals noted that it was obliged to make certain that the punitive damages were proportional to the harm to the Petitioner and the damages recovered by the Petitioner. *Kelly*, 245 S.W.3d at 851 (Pet. For Cert. A-39).

Accordingly, Petitioner's assertion that the Missouri Court of Appeals simply looked at the ratio of compensatory damages to punitive damages and that the court requires "further enlightenment and education on this issue" is inaccurate. (Pet. For Cert. pg. 15).

Additionally, Petitioner asserts that the Missouri Court of Appeals failed to undertake a proper review of the facts of the case. To the contrary, the court's opinion includes a four page statement of the facts, which were considered in the light most favorable to the verdict issued. *Kelly*, 245 S.W.3d at 843-846 (Pet. For Cert. A-20-A29).

As a result, certiorari should not be granted as to Petitioner's second question presented.

III. CERTIORARI SHOULD NOT BE GRANTED ON WHETHER A JURY VERDICT OF $2,800,000.00 IN PUNITIVE DAMAGES WITH $4,300.00 IN ACTUAL DAMAGES COMPORTS WITH THE DUE PROCESS CLAUSE BECAUSE THE MISSOURI COURTS' OPINION THAT THE PUNITIVE DAMAGES WERE UNCONSTITUTIONALLY EXCESSIVE COMPORTS WITH ESTABLISHED PRECEDENT.

For his third question presented, Petitioner maintains that this Court should grant certiorari to determine whether "a unanimous jury verdict of $4,300.00 in actual damages and $2,800,000.00 in punitive damages comport with due process, if the facts show a high degree of reprehensibility?"

Respondent believes that certiorari should not be granted on this issue. This Court's precedent clearly supports a finding that excessive punitive damage awards can violate the Due Process Clause of the Fourteenth Amendment. In this case, the Missouri Court of Appeals was correct in finding that the punitive damages award of 651 times the amount of compensatory damages violated the Respondent's due process rights.

"Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion." *Cooper Industries, Inc.*, 532 U.S. at 433. "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary

punishments on a tortfeasor." *Campbell*, 538 U.S. at 416.

"While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." *Campbell*, 538 U.S. at 416. "Substantively, when an award can be fairly categorized as 'grossly excessive' in relation to the interests of punishment and deterrence, it penetrates the 'zone of arbitrariness' that violates that Due Process Clause of the Fourteenth Amendment." *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 177 (Mo. Ct. App. 1997).

This Court has noted the dangers inherent in punitive damages awards. "Punitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994). "Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor Co., Ltd.*, 512 U.S. at 432.

Accordingly, constitutional safeguards apply to protect parties that may be subjected to punitive damages. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. This requirement of notice applies to corporations, as well as individuals. *Gore*, 517 U.S. at 585.

Consequently, every punitive damages award must meet the due process standards. *Exxon Shipping Co.*, 2008 WL 2511219, at *16.

Missouri courts have likewise held that the Due Process Clause of the Fourteenth Amendment of the United States Constitution constrains excessive punitive damages. "The Due Process Clause requires that adequate standards and controls be established to prevent a punitive damages award from constituting the arbitrary deprivation of property." *Letz*, 975 S.W.2d at 166.

As noted by the Missouri Court of Appeals in its opinion, this Court has identified the following "guideposts" to be used when evaluating allegedly excessive punitive damage awards: "(1) the reprehensibility of the defendant's conduct; (2) the disparity between the harm and punitive damages award; and (3) the difference between the punitive award and penalties authorized or imposed in comparable cases." *Kelly*, 245 S.W.3d at 850 (Pet. For Cert. A-38). *See Gore*, 517 U.S. at 575. In this case, those guideposts support the Missouri Court of Appeals' finding that the punitive damages award in this case was grossly excessive.

With regard to the comparison of the compensatory damages and the punitive damages, the ratio in this case was 651 to 1. *Kelly*, 245 S.W.3d at 850 (Pet. For Cert. A-39). The Missouri Court of Appeals was correct in holding that ratio was grossly excessive under the Due Process Clause of the Fourteenth Amendment. *See Campbell*, 538 U.S. at 417 ("To the extent an award is grossly excessive, it furthers no

legitimate purpose and constitutes an arbitrary deprivation of property.").

In *BMW of North America, Inc. v. Gore*, a punitive damages award by a jury in an amount 500 times the amount of compensatory damages was held to be excessive. 517 U.S. at 582, 586.

Likewise, in *Campbell v. State Farm Mutual Insurance Company*, punitive damages of $145,000,000.00 in a case where $1,000,000.00 of compensatory damages were awarded were held to be grossly excessive. 538 U.S. at 418. This Court indicated that under the facts of *Campbell*, there was a presumption against the validity of a punitive damages award that was 145 times the amount of general damages. 538 U.S. at 426.

In *Campbell*, this Court noted that: "[o]ur jurisprudence and the principles it has now established demonstrate, however, that, in practice few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425.

"Single digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1." *Campbell*, 538 U.S. at 425.

The punitive damages awarded to Petitioner was 651 times the amount of compensatory damages. Under this Court's precedent, that amount is clearly unconstitutionally excessive. *See Gore*, 517 U.S. at 586 and *Campbell*, 538 U.S. at 426.

Moreover, this Court has recently indicated that there may be further limitations on punitive damages beyond those imposed by the Due Process Clause of the Fourteenth Amendment. In *Exxon Shipping Company v. Baker*, this Court indicated that it also has a concern for regulating punitive damages "as a common law remedy". 2008 WL 2511219 at *16.

Accordingly, even beyond due process limitations, other grounds exist for limiting punitive damages because of unpredictability of such awards. "Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another." *Exxon Shipping Company*, 2008 WL 2511219 at *16. Even bad actors are entitled to some notice of the potential punishment their actions may bring. *Exxon Shipping Company*, 2008 WL 2511219 at *16.

In *Exxon Shipping Company*, this Court recently indicated that a one to one ratio between punitive damages and compensatory damages was appropriate. 2008 WL 2511219 at *21-22.

Additionally, Plaintiff's own Petition shows that the punitive damages awarded were excessive. In his Petition, Plaintiff requested only $1,000,000.00 of punitive damages, $1,800,000.00 less than what he was awarded. (Appendix A – Petition).

Based upon those considerations, the Missouri Court of Appeals' decision that the punitive damages award to Petitioner was excessive was proper. *See Gore*, 517 U.S. at 586 and *Campbell*, 538 U.S. at 426.

Additionally, a review of the facts of this case indicates that Respondent's degree of reprehensibility is not such that it should be subjected to punitive damages 651 times greater than Petitioner's compensatory damages. As noted by this Court, this factor focuses on the idea that the "punishment should fit the crime." *Gore*, 517 U.S. at 576 fn. 24.

This Court has directed courts to evaluate reprehensibility by evaluating whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. Campbell, 538 U.S. at 419.

The mere existence of one of those factors "may not be sufficient to sustain a punitive damages award." *Campbell*, 538 U.S. at 419.

In this case, Petitioner's Petition for Certiorari acknowledges that the harm to Petition was economic not physical. (Pet. For Cert. pg. 19). "Purely economic harm may warrant less punishment than harm to the health or safety of individuals." *Continental Trend Resources, Inc.*, 101 F.3d at 638.

Moreover, there is no evidence that Respondent acted with a reckless disregard to the health or safety of others. Petitioner asserts that Respondent's actions were in "a complete indifference to and conscious disregard for the *rights* and safety of others." (Pet. For Cert. pg. 20). The factor established in *Campbell* is disregard for the "health or safety of others." *Campbell*, 538 U.S. at 419. Petitioner's alteration of the relevant factors is demonstrative of the fact that Petitioner apparently acknowledges that Respondent did not act to endanger the health or safety of others.

Further, Petitioner argues that since the jury awarded punitive damages, Respondent must have acted with disregard to the health or safety of others. (Pet. For Cert. pg. 20). This argument ignores that the reprehensibility factors only apply when punitive damages have been awarded.

Petitioner's Petition for Certiorari notes only that Petitioner lost his job in arguing the financial vulnerability of Petitioner. There are no further facts showing any particular vulnerability of Petitioner. Moreover, the Missouri Court of Appeals specifically noted that Petitioner was unemployed for a relatively short period of time. *Kelly*, 245 S.W.3d at 850 (Pet. For Cert. A-40).

Additionally, there is no evidence that Respondent terminated other employees for reporting potentially illegal conduct, as alleged in this case. Accordingly, the factors do not suggest that Respondent is a recidivist. Petitioner asserts that this factor weighs in favor of finding Respondent's actions reprehensible because Respondent allegedly covered up its actions regarding Petitioner. However, the

allegation that Respondent was steadfast in its actions towards Petitioner does not establish that Respondent acted in the same manner towards other employees.

The final factor to be evaluated regarding a party's reprehensibility is whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Campbell*, 538 U.S. at 419.

In support of his assertion that Respondent's actions meet these criteria, Petitioner misrepresents many of the findings of this case.

Petitioner asserts that the Missouri Court of Appeals' opinion indicated that Respondent "threatened other employees with termination if they did not cover up the criminal activity of management," which is patently incorrect. (Pet. For Cert. pg. 22). The Missouri Court of Appeals indicated that Respondent told other employees to stop discussing the issue amongst themselves and that employees who did not do so would be terminated. *Kelly*, 245 S.W.3d at 846 (Pet. For Cert. A-29). The Missouri Court of Appeals' opinion does not indicate that other employees were threatened with termination if they failed to "cover up" the incident.

Petitioner's Petition for Certiorari also asserts that the Missouri Court of Appeals noted the "repeated incidents in which Defendant could have corrected its misconduct." (Pet. For Cert. pg. 21, citing A-33 and A-34 of *Kelly*). A review of the Missouri Court of Appeals' opinion does not indicate any listing of the Respondent's "repeated instances" to correct its alleged conduct.

Additionally, Petitioner cites pages A-33 and A-34 of the appellate opinion for the assertion that the "termination of Plaintiff was not an isolated incident, but rather, part of an entire scheme to cover up the criminal activity of management, as described in the State Appellate Court's Opinion." Nothing on the cited pages of the Missouri Court of Appeals indicates a finding that Respondent was engaged in a "scheme" to "cover up" criminal activity.

Petitioner further asserts that that the Missouri Court of Appeals found that "Bass Pro management committed a crime that was reported by Plaintiff." (Pet. For Cert. pg. 22). To the contrary, the Missouri Court of Appeals' opinion makes no finding that a crime actually occurred. *Kelly*, 245 S.W.3d at 849.

Moreover, Petitioner's assertion that Respondent "promoted the management for covering up the real reason for Plaintiff's termination" is also unsupported by any finding of the jury or determination of the facts by the Missouri Court of Appeals. (Pet. For Cert. pg. 22).

Likewise, Petitioner's inflammatory assertion that Respondent "had its managers commit perjury to cover up the real reasons for Plaintiff's termination" is not supported by the record. (Pet. For Cert. pg. 22). Moreover, Petitioner's assertion that Respondent's "entire defense was a deceitful fraud on the Court, the jury and all its employees" is also unsupported by the facts of this case. (Pet. For Cert. pg. 22).

Additionally, Petitioner asserts that $2,800,000.00 in punitive damages are warranted, in part, because Mr. Ritter did not review his deposition

or the tape of him entering the Buick to prepare for trial. (Pet. For Cert. pg. 24). Respondent is unaware of how this relates in any manner to its liability for punitive damages.

Petitioner argues that Mr. Beasley's father is a Vice President of Respondent as support for the award of the amount of punitive damages. (Pet. For Cert. pg. 23). Respondent is mystified as to how that fact justifies an award of $2,800,000.00 in punitive damages.

While the jury found distaste for Respondent's actions, the Missouri Court of Appeals held that the jury cannot have unfettered discretion awarding punitive damages so as to deny Respondent its due process rights.

Even where a defendant's conduct "merits no praise," punitive damages have been found to be unconstitutionally excessive under the *Gore* criteria. *Campbell*, 538 U.S. at 419, 429.

In *Campbell*, there was evidence that State Farm employees altered the company's records. 538 U.S. at 419. Additionally, the company ignored the large likelihood that its insureds, the plaintiffs, would be found liable on the underlying claim and allowed it to proceed to trial. *Campbell*, 538 U.S. at 419. Further, after originally telling the plaintiffs that their assets would be safe, the company then suggested that the plaintiffs put their house up for sale after the jury verdict. *Campbell*, 538 U.S. at 419. Even under those egregious facts, the punitive damages award ratio of 145 to 1 was found unconstitutionally excessive. *Campbell*, 538 U.S. at 429.

Likewise, the punitive damages award was grossly excessive in this case. The amount of punitive damages awarded by the jury was 651 times the amount of Petitioner's compensatory damages.

The final guidepost for evaluating punitive damage awards involves comparing the award to potential civil and criminal penalties for comparable misconduct. "Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *Gore*, 517 U.S. at 583. However, the potential criminal penalty is of limited utility when evaluating the dollar amount of punitive damages. *Campbell*, 538 U.S. at 428.

This factor also considers whether the Respondent's conduct would have been likely to be subjected to civil penalties approaching the amount of punitive damages. *Leatherman Tool Group, Inc.*, 285 F.3d at 1148.

Nothing in the facts of this case suggests that Respondent could have been subject to any civil penalties for its actions, let alone in an amount that equaled the $2,800,000.00 awarded in punitive damages. Accordingly, when looking at the possible civil penalties for Respondent's alleged conduct, it is clear that the punitive damages awarded in this case were excessive.

The Missouri Court of Appeals' determination that the punitive damages award was unconstitutionally excessive was proper based upon established case law. Accordingly, certiorari should not be granted on this issue.

IV. CERTIORARI SHOULD NOT BE GRANTED WITH REGARD TO WHETHER THIS COURT SHOULD REVISIT THE QUESTION OF WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION SETS SUBSTANTIVE RIGHTS OF LIMITED PUNITIVE DAMAGES BECAUSE PETITIONER HAS NOT DEMONSTRATED ANY REASON FOR THIS COURT TO RECONSIDER ITS ESTABLISHED PRECEDENT REGARDING LIMITATIONS ON PUNITIVE DAMAGES.

For his fourth basis for certiorari, Petitioner asserts that this Court should revisit its prior rulings that the Due Process Clause of the Fourteenth Amendment places limitations on punitive damages.

Specifically, Petitioner's Petition for Certiorari asserts that the "legal fiction that the Due Process Clause of the 14th Amendment to the United States Constitution imposes substantive limits on the discretion of state courts to affirm unanimous jury verdicts for punitive damages actually constitutes a license to permit large corporations to financially enslave its employees." (Pet. For Cert. pg. 26).

In numerous cases, this Court has found that there are serious constitutional concerns with regard to the imposition of punitive damages. "Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over

the imprecise manner in which punitive damages systems are administered." *Campbell*, 538 U.S. at 417.

A state's punitive damages system that lacks proper controls has the danger of (1) depriving a defendant of fair notice of the penalty that may be imposed, (2) threatening arbitrary punishment, and (3) imposing one state's policy choices on other states. *Phillip Morris USA v. Williams*, 127 S.Ct. 1057, 1062 (2007).

Moreover, judicial review and reversal of punitive damages has origins outside of the Due Process Clause. "The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree." *Gore*, 517 U.S. at 580. "Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Honda Motor Co., Ltd.*, 512 U.S. at 421.

This history of reviewing punitive damages awards dates back to English common law. *Honda Motor Co., Ltd.*, 512 U.S. at 420-424. In the United States, courts reviewed awards prior to the ratification of the Fourteenth Amendment. *Honda Motor Co., Ltd.*, 512 U.S. at 425.

Further, this Court recently noted that its bases for reviewing punitive damages awards extend beyond the Due Process Clause. In *Exxon Shipping Company v. Baker*, this Court found that it has a concern for regulating punitive damages "as a common law remedy". 2008 WL 2511219 at *16.

"Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another." *Exxon Shipping Company*, 2008 WL 2511219 at *16 (reviewing punitive damages award).

In fact, the Court's decision in *Exxon Shipping Company* seems to suggest that a one to one ratio between punitive damages and compensatory damages is appropriate. 2008 WL 2511219 at *21-22. Respondents believes that a one to one ratio would be appropriate in this case.

Petitioner has cited no support for his assertion that appellate review of punitive damages awards should be reconsidered. Courts have reviewed such awards for as long as they have been in existence. *Honda Motor Co., Ltd.*, 512 U.S. at 421. Petitioner's concerns notwithstanding, there is no justification to change that practice.

CONCLUSION

The punitive damages award in this case was 651 times the compensatory damages award. The Missouri courts' determination that the punitive award was unconstitutionally excessive was amply supported by this Court's precedent. Accordingly, certiorari should not be granted on the ruling that the award was

unconstitutionally excessive (Petitioner's Questions Presented II-IV).

Respondent agrees that this Court should consider granting certiorari on the narrow issue of providing guidance to the Missouri appellate courts on the maximum amount of punitive damages that can be awarded to Petitioner.

Respectfully submitted,

Charles E. Reis, IV
Two CityPlace Drive
Suite 200
St. Louis, Missouri 63141
Phone: (314) 432-4797
Facsimile: (314) 432-4796
creis@littler.com

Peter Susser
Counsel of Record
Littler Mendelson, P.C.
1150 17th Street, NW
Suite 900
Washington, D.C. 20036
Phone: (202) 414-6868
Facsimile: (202) 842-0011
psusser@littler.com